No. 73-764

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In the Supreme Court of the United States

OCTOBER TERM, 1973

BETH W. CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The sole question presented in the petition concerns the correct basis of land sold by petitioner in 1964.

In 1963, Jewell Waldrep transferred 796.27 acres of land to petitioner, in exchange for all of its common stock. This land was acquired by Jewell Waldrep in 1957 pursuant to a mutual property settlement agreement with her husband upon their divorce. Under the agreement, all of the real estate acquired during the marriage, which was held by Jewell Waldrep and her husband as tenants by the entireties under Florida law, was divided so that each of the parties was left holding land of essentially equal value (Pet. App. 2, 6). Petitioner thereafter sold 40 acres of the land for $113,100 (Pet. App. 2).

It is undisputed that petitioner's basis in the land is equal to Jewell Waldrep's basis as of the time of her transfer of the land to petitioner.[1] The question is whether petitioner's basis is the original cost of $1 per acre to Jewell Waldrep and her husband, as the government contended, or, as petitioner urged, the fair market value of $5,000 per acre as of the date of her divorce property settlement in 1957. The first basis figure would yield a taxable gain of $113,060 upon the 1964 sale, while the latter basis figure urged by petitioner would yield a taxable loss of $86,900.

Both courts below determined that Jewell Waldrep received the land in question under a division of property between co-owners under local law, which was nontaxable under this Court's decision in *United States* v. *Davis,* 370 U.S. 65. As a result, she did not receive a new basis in the property equal to its fair market value at the time of the settlement. Her basis in the property continued to be her original cost of $1 per acre (Pet. App. 1-7).

1. The decision below does not, as petitioner contends (Pet. 12-20), conflict with *United States* v. *Davis, supra.* There, pursuant to a property settlement, the taxpayer transferred securities, held in his name alone during marriage, to his former wife. Because of the husband's ownership, the Commissioner determined that, under the applicable law of Delaware, the transfer was a taxable event to the husband since it was in the nature of a transfer in exchange for the release of his independent legal obligations to his wife. In upholding the Commissioner's determination, this Court rejected the taxpayer's argument that the transfer was

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[1] See Internal Revenue Code of 1954, Section 362(a).

a non-taxable division between two co-owners because the law of Delaware did not make the wife co-owner of her husband's personal property; it merely placed a burden on it. See 370 U.S. at 70-71.

But here, under Florida law, upon their divorce Jewell Waldrep and her husband each took one-half of the real estate which they owned as tenants by the entireties. The settlement was therefore a non-taxable division between co-owners.

Petitioner errs in contending (Pet. 17-19) that the courts below misinterpreted the applicable state law governing such co-tenancies. Under Florida law, a tenancy by the entireties is but one estate, held by one person (the married couple). Thus, each spouse owns the entire estate and not simply a divisible part. *Bailey* v. *Smith,* 89 Fla. 303, 103 So. 833; *Crawford* v. *United States Fidelity and Guaranty Co.,* 139 So. 2d 500, 501 (Fla. Dist. Ct. of App.). It cannot be partitioned during marriage. *Naurison* v. *Naurison,* 132 So. 2d 623 (Fla. Dist. Ct. of App.).[2] Nor can either spouse convey, lease or encumber such property without the joinder of the other, and such property is not sub-

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[2] Compare *Collins* v. *Commissioner,* 412 F. 2d 211 (C.A. 10), on remand from this Court (393 U.S. 215) to consider an intervening state supreme court decision. The Tenth Circuit held that there was a non-taxable division of property because Oklahoma law gave the wife a vested co-ownership interest with respect to property acquired through the joint efforts of the spouses, which could be partitioned by a court even in the absence of divorce. This case must be viewed in the light of two subsequent Oklahoma Supreme Court decisions to the contrary. See *McDaniel* v. *Oklahoma Tax Commission,* 499 P. 2d 1391, and *Sanditen* v. *Sanditen,* 496 P. 2d 365, both holding that the wife has a vested interest in the jointly acquired property only for purposes of divorce dispositions.

ject to execution to satisfy the debt of either spouse. *France* v. *Hart,* 170 So. 2d 52 (Fla. Dist. Ct. of App.); *Montgomery* v. *Gipson,* 69 So. 2d 305 (Fla.). Upon the death of one spouse, such property is vested by operation of law in the surviving spouse, and upon divorce the tenants become tenants in common. Fla. Stat. Ann. §689.15. In light of the attributes of a tenancy by the entireties under Florida law, the courts below correctly held that Jewell Waldrep's rights in the real estate in question attained "the dignity of co-ownership" within the meaning of the *Davis* decision (Pet. App. 4).

2. Petitioner further argues (Pet. 21-26) that the decision below is in conflict with *Pulliam* v. *Commissioner,* 329 F. 2d 97 (C.A. 10), certiorari denied, 379 U.S. 836, affirming 39 T.C. 883. That case did not involve a tenancy by the entireties or any other co-ownership status recognized under local law. There, in a Colorado divorce, the local court permitted each spouse to retain property then standing in their separate names, except for certain realty as to which the decree was to constitute a conveyance from husband to wife. With respect to the latter property thus "conveyed" to the wife, the courts held that the *Davis* rule applied even though the transfer was effected by the decree rather than by the husband's deed.[3]

3. Finally, there is no basis for petitioner's contention (Pet. 23-24) that under Florida law the tenancies by the entireties at issue would be disregarded as a fraud on the husband's creditors. While a creditor of the husband

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[3] Although one parcel of this property was purchased by the husband in his wife's name, the Tax Court held (39 T.C. at 884-885) that the husband in fact owned the property.

had obtained a judgment against him, petitioner itself concedes (Pet. 24) that the purchasing of land under the form of tenancy by the entireties continued long after the last judgment creditor was satisfied in 1941.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

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